United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7192

United States Court of Appeals
FOR THE SECOND CIRCUIT

JUL 17 1977
ANTHONY FASANO, CLERK
SECOND CIRCUIT

HAROLD AMES,

Plaintiff-Appellant,

against

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.
and CHRISTOPHER V. STREIT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

LOWENTHAL, LANDAU, FISCHER & SINGER, P. C.
Attorneys for Plaintiff-Appellant
250 Park Avenue
New York, N.Y. 10017

JAMES J. DOLAN
Attorney for Defendants-Appellees
165 Broadway
New York, N.Y. 10006

PAGINATION AS IN ORIGINAL COPY

I N D E X

	Page
Docket Entries	1a
Notice of Motion	3a
Affidavit of James J. Dolan in Support of Motion	4a
Exhibit 1 Annexed to Affidavit of James J. Dolan	7a
Exhibit 2 Annexed to Affidavit of James J. Dolan	14a
Exhibit 3 Annexed to Affidavit of James J. Dolan	18a
Exhibit 4 Annexed to Affidavit of James J. Dolan	19a
Affidavit of Christopher V. Streit in Support of Motion	31a
Exhibit A Annexed to Affidavit of Christopher V. Streit	35a
Memorandum Opinion and Order	36a

Docket Entries

		R	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	$ DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
208-1	76	3085	07	13	76	3	850	1			125,	0865	P	76	3085 Haight,J.

PLAINTIFFS	DEFENDANTS
AMES, HAROLD	MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and STREIT, CHRISTOPHER V.

CAUSE

Violation of Commodities Exchange Act.

rs

ATTORNEYS

Lowenthal Freedman Landau Fischer & Todres
250 Park Ave., N.Y.C. 10017
986-1116

James J. Dolan
165 Broadway - 31st Floor
N.Y.C. 10006
766-5130

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	JUL 13 1976	72992		JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

Docket Entries

AMES, HAROLD -v- MERRILL, LYNCH PIERCE, FENNER & SMITH, INC., et ano.

76 Civ. 3085 **Haig**

DATE	NR.	PROCEEDINGS
07-13-76	1	**Filed complaint & issued summons.**
08-17-76	2	Filed Defts'. ANSWER to the complaint. JJD
08-19-76	3	Filed Pltff's. notice of taking deposition of Christopher V. Streit on 9-7-76.
08-31-76	----	Before Haight,J. pre-trial conference held & concluded. re: to consider a protective order. Decision Reserved.
09-03-76	4	Filed Defts'. affidavit & notice of motion to dismiss the complaint or for a stay of trial and to compel arbitration, ret. 9-10-76.
09-03-76	5	Filed Defts'. memorandum in support of motion to dismiss, etc.
10-13-76	6	Filed memo in opposition to Motion to dismiss or Stay this action.
10-13-76	7	Filed defts reply memo.
3-21-77	8	Filed opinion # 45709..... I conclude that defts are entitled to arbitrate the inst dispute pursuant to the terms of the Customer Agreement signed by pltff.. I grant deft's application to stay the instant proceedings pursuant to 9 USC sec 3..... The jurisdiction of the instant action is in this Court etc.. I deny motion to dismiss complaint... Action transferred to suspense docket..It may be restored on 5 days notice by either party after complettion of arbitration proceedings. Haight J. m/n
4-18-77	9	**Filed notice of appeal to USCA from order dated 3-18-77 fo J. Haight m/n**
*Aug 6-76	10	Filed Summons with Marshal's return. Served Merrill, Lynch on 7-19-76. Unable to serve Christopher V. Streit.

Notice of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD AMES,

Plaintiff,

-against-

Index No. 76 Civ. 3085
(Judge Haight)

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., and CHRISTOPHER V. STREIT,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed affidavits and all the papers and proceedings herein, the undersigned will move in Courtroom 129, United States Courthouse, Foley Square, New York, New York, on September 10, 1976 at 10:00 A.M. for an order pursuant to F. R. Civ. P. 8(a)(1) and 12(b)(1) dismissing the Complaint or, in the alternative, for an order pursuant to 9 U.S.C. §3 staying the trial of this action and compelling arbitration, and for such other and further relief as to the Court may seem just and proper.

New York, New York
September 3, 1976

JAMES J. DOLAN
Attorney for Defendants
165 Broadway - 31st Floor
New York, New York 10006
(212) 766-5130

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD AMES,

Plaintiff,

-against-

Index No. 76 Civ. 3085
(Judge Haight)

MERRILL LYNCH, PIERCE, FENNER &
SMITH INC., and CHRISTOPHER V. STREIT

Defendants.

AFFIDAVIT OF JAMES J. DOLAN

STATE OF NEW YORK

COUNTY OF NEW YORK

JAMES J. DOLAN, being duly sworn, deposes and says:

I am counsel for the defendants Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and Christopher V. Streit ("Streit"). Merrill Lynch is a member corporation of the New York Stock Exchange, Inc. and Streit is employed by Merrill Lynch as a registered representative in the position of Commodity Account Executive. I am submitting this affidavit in support of defendants' motion to dismiss the Complaint or, in the alternative, to stay the trial of this action and to compel arbitration. In preparation for this affidavit, I examined such records of Merrill Lynch and made such inquiries of Streit and others as I consider necessary to making the statements herein.

Affidavit of James J. Dolan

Annexed are exhibits which may be referred to in the proceedings on this motion:

Item	Exhibit No.
Complaint	1
Answer	2
Commodity Account Agreement	3
Excerpts from Constitution and Rules of New York Stock Exchange Inc.	4

This is a private action under the Commodity Exchange Act for damages resulting from alleged losses in commodity futures trading. The Complaint [¶4] (Exhibit 1) contains an allegation of jurisdiction in which plaintiff asserts that jurisdiction is founded upon the Commodities [sic] Exchange Act, as amended. There is no jurisdictional provision in the Commodity Exchange Act and jurisdictional grounds of private actions under the Act must be found elsewhere. The Federal Rules of Civil Procedure [F.R. Civ. P. 8(a)(1)] require a short and plain statement of the grounds upon which the Court's jurisdiction depends; absent such allegation, the Complaint must be dismissed.

Defendants seek alternative relief on this motion. In the Answer [¶15] (Exhibit 2), defendants alleged that the claims that are the subject matter of the Complaint must be submitted to arbitration. Streit's affidavit sets forth the arbitration agreement. The agreement to arbitrate is in full force and effect and is a valid and binding obligation, enforceable

in accordance with its terms. There are no conditions to the enforcement of, and compliance with the agreement to arbitrate. The dispute that is the subject of the Complaint is within the scope of the agreement to arbitrate and is, therefore, arbitrable under the terms and conditions specified therein. Defendants are not in default proceeding with the arbitration and have not waived the right to arbitrate.

For the reasons set forth in these motion papers and in the accompanying memorandum of law, defendants Merrill Lynch and Streit request that the Complaint be dismissed. Alternatively, if the foregoing order is not granted, defendants request that the trial of this action be stayed pending the outcome of arbitration pursuant to the written agreement to arbitrate.

James J. Dolan

JAMES J. DOLAN

Subscribed and sworn to
this 3rd day of September 1976

Rose Sirino

ROSE SIRINO
NOTARY PUBLIC, State of New York
[illegible]
[illegible] County
[illegible] 1977

Exhibit 1 Annexed to Affidavit of James J. Dolan

United States District Court
Southern District of New York

----------X

Harold Ames, :

Plaintiff, :

-against- :

Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Christopher V. Streit, :

Defendants. :

----------X

Complaint

Plaintiff alleges:

1. Plaintiff is a resident and citizen of the State of New York and maintains his offices within the Southern District of New York.

2. Upon information and belief, defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc. is a Delaware corporation engaged in business as a securities and commodities broker and dealer which maintains its principal offices in the Southern District of New York.

3. Defendant Christopher V. Streit is the Commodity Department Manager in the offices of defendant Merrill, Lynch, Pierce, Fenner & Smith located at 260 Madison Avenue in the City, County and State of New York.

4. Jurisdiction in this action is founded upon the Commodities Exchange Act, 7 U.S.C. 2 et. seq., as amended by the Commodity Futures Trading Commission Act of 1974 and regulations promulgated thereunder, and upon principles of pendent jurisdiction.

5. As hereinafter set forth, defendants, in violation of Sections 6b and 6o of the Commodities Exchange Act, 7 U.S.C. Sections 6b and 6o, by use of the mails and instrumentalities of interstate commerce:

a) cheated and defrauded plaintiff;

b) willfully made and caused to be made to plaintiff false reports and statements in connection with orders and the making of contracts of sale of commodities in interstate commerce;

c) willfully deceived plaintiff with regard to such orders and contracts and the dispositions and executions of such orders and contracts;

d) employed a device, scheme or artifice to defraud plaintiff; and

e) engaged in transactions, practices and a course of business which operated as a fraud and deceit upon plaintiff.

6. In or about October 1975, defendants proposed to plaintiff a program pursuant to which plaintiff would take a

hedge position in copper futures contracts. Defendants proposed that plaintiff purchase 200 to 300 May copper contracts and sell short 200 to 300 December copper contracts.

7. Plaintiff authorized defendants to execute transactions to effect the hedge position proposed by defendants on the condition that the price spread of this six month hedge be no less than 3 cents per pound.

8. At or about the same time, defendants also proposed that plaintiff invest in 20 to 30 copper contracts without a hedge.

9. Plaintiff disclosed to defendants that plaintiff had no experience in trading or investing in commodities futures, and plaintiff expressly required and defendants willfully falsely represented to plaintiff that any investment program for plaintiff would be restricted to the above described limits, and that no change in such program would be executed on behalf of plaintiff unless it was discussed in detail and expressly approved not only by plaintiff, but by Mr. Norman Elliott, plaintiff's business advisor.

10. Pursuant to these discussions, and in reliance upon defendants' willfully false representations, plaintiff opened a non-discretionary regulated commodities account and a securities account with defendant Merrill, Lynch, Pierce, Fenner & Smith, and as margin for his proposed commodities transactions,

plaintiff transferred to his said securities account the sum of $100,000 which plaintiff ordered should be invested in United States Treasury Bills.

11. Thereafter, in accordance with the authorization of plaintiff and consistent with the program proposed by defendants, defendants executed for plaintiff's account a hedge position in which plaintiff bought 200 May copper contracts and sold short 200 December copper contracts with a spread of about 3.21 cent per pound.

12. In addition, defendants executed for plaintiff's account a purchase of 40 July copper contracts.

13. Thereafter, in January 1976, defendants executed for plaintiff's account another hedge position pursuant to which there were purchased 100 additional May copper contracts and sold short 100 January copper contracts.

14. Thereafter, in violation of plaintiff's express instructions and without prior authority or notice to plaintiff, defendants took control of plaintiff's account and undertook to undo and modify the carefully planned and profitable program of plaintiff in a manner which was not only unauthorized but also contrary to good trading practice.

15. The unauthorized transactions which defendants executed for the account of plaintiff were fradulent in that said transactions were executed primarily for the purpose of

generating commissions for defendants, constituted excessive trading unrelated to the needs and objectives of plaintiff and disproportionate to the size and character of the account, disregarded the interests of plaintiff and had no substantial likelihood of resulting in a profit to plaintiff.

16. Instead of the 300 contract hedge position and the 40 contract long position in copper contracts which plaintiff had authorized, defendants churned plaintiff's account and executed without authority from plaintiff for plaintiff's account 1152 copper contracts.

17. During the period January 1976 through May 1976, plaintiff inquired of defendants concerning the financial status of plaintiff's aforesaid commodities account. In response to these inquiries, defendants willfully made and caused to be made to plaintiff false reports and statements to the effect that defendants were adhering to the investment program discussed with and agreed to by plaintiff, that plaintiff was continuing to enjoy profits in his account and that margin notices sent in January and May were mistakes caused by computer malfunction,and defendants thereby willfully deceived plaintiff with regard to the orders and contracts and dispositions and executions of the orders and contracts in plaintiff's account.

18. Based upon the program originally proposed by defendants and authorized by plaintiff, it was contemplated that the hedge position executed on behalf of plaintiff would be

liquidated in April 1976, and had this occurred there would have been a gross profit to plaintiff of $45,500, less $14,000 in commissions, for a net profit to plaintiff on his copper hedge in the sum of $31,500. In addition, plaintiff would have received a profit on the 40 long contracts of $13,500 net of commissions, making a total profit of $45,000.

19. By reason of the transactions executed by defendants without authority from plaintiff, defendants charged plaintiff with commissions on copper contracts in the sum of $54,540 instead of the $17,600 to which defendants were entitled on the transactions authorized by plaintiff.

20. By reason of defendants' unauthorized and improper transactions in plaintiff's commodities contracts, plaintiff was deprived of his $45,000 profit and was charged with a $51,000 loss and thereby was damaged in the sum of $96,000.

21. In addition, without prior authority from or notice to plaintiff, defendants executed plywood futures contracts for the account of plaintiff resulting in losses of approximately $13,000.

22. In addition, without prior authority from or notice to plaintiff, defendants executed lumber futures contracts for the account of plaintiff resulting in losses of approximately $16,000.

Wherefore, plaintiff demands judgment against defendants in the sum of $125,000 together with interest and his costs and disbursements in this action.

Dated: New York, New York
July 12, 1976

Lowenthal, Landau, Fischer & Singer, P.C.
Attorneys for Plaintiff

By _____
(A Member of the Firm)
250 Park Avenue
New York, New York 10017
(212) 986-1116

Exhibit 2 Annexed to Affidavit of James J. Dolan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD AMES, Plaintiff, -against- MERRILL LYNCH, PIERCE, FENNER & SMITH INC., and CHRISTOPHER V. STREIT Defendants.	Index No. 76 Civ. 3085 (Judge Haight) ANSWER

Defendants, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and Christopher V. Streit, by their attorney J. J. Dolan, for their Answer to the Complaint, allege:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Admit the allegations contained in paragraph 2 of the Complaint.

3. Deny the allegations in paragraph 3 of the Complaint, except admit that Christopher V. Streit is employed by Merrill Lynch at its office at 260 Madison Avenue, New York, New York.

4. Deny the allegations in paragraph 4 of the Complaint, except admit that plaintiff purports to base jurisdiction upon the provisions and principles of law referred to therein.

5. Deny the allegations in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of

the Complaint, except admit that plaintiff did at certain times maintain a commodity account with Merrill Lynch.

FIRST AFFIRMATIVE DEFENSE

6. This Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

7. Plaintiff has failed to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

8. Plaintiff's claims are barred by the applicable statutes of limitations.

FOURTH AFFIRMATIVE DEFENSE

9. Plaintiff's claims are barred by the principle of laches.

FIFTH AFFIRMATIVE DEFENSE

10. Plaintiff is estopped from asserting claims due to his own acts and conduct.

SIXTH AFFIRMATIVE DEFENSE

11. Plaintiff has failed to mitigate his alleged damages.

SEVENTH AFFIRMATIVE DEFENSE

12. Plaintiff has suffered no damages by reason of the acts and conducts complained of herein because such alleged

acts and conduct did not contribute to any losses allegedly suffered by plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

13. Plaintiff, after investigation, voluntarily entered into commodity futures trading and assumed all the risks attendant thereto.

NINTH AFFIRMATIVE DEFENSE

14. Defendants, while expressly denying any liability, state that in any event they are not liable for any damages during any period in which plaintiff was unable to liquidate any position he held in any commodity futures contract due to market action or conditions.

TENTH AFFIRMATIVE DEFENSE

15. The claims that are the subject matter of the complaint must be submitted to arbitration in accordance with a written agreement to arbitrate.

Exhibit 2

WHEREFORE, defendants demand judgment as follows:

A. For the dismissal of the Complaint.

B. For costs and disbursements in connection with the defense of this action.

C. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
August 16, 1976

J. J. DOLAN
Attorney for Defendants
165 Broadway - 31st Floor
New York, New York 10006
(212) 766-5130

18a
Exhibit 3 Annexed to Affidavit
of James J. Dolan

CODE 918-6-67 **COMMODITY ACCOUNT AGREEMENT**

Merrill Lynch, Pierce, Fenner & Smith Incorporated

In consideration of your acting as broker for the undersigned, I hereby consent and agree that:

Any and all transactions shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market (and its clearing house, if any), where executed.

Any and all commodities or contracts relating thereto, now or hereafter held or carried by you for me, (either individually or jointly with others) are to be held by you as security for the payment of any liability of mine to you.

You shall have the right, whenever in your discretion you consider it necessary for your protection, or in the event that a petition in bankruptcy, or for the appointment of a receiver, is filed by or against me, or an attachment is levied against my account(s) with you, or in the event of my death, to sell any or all commodities in my account(s) (either individually or jointly with others) to buy any or all commodities which may be short in such account(s) and to close any or all outstanding contracts, all without demand for margin or additional margin, notice of sale or purchase, or other notice or advertisement, and any such sales or purchases may be made at your discretion on any exchange or other market where such business is then usually transacted, and on any such sale you may be the purchaser for your own account, it being understood that a prior demand, or call, or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or to buy without demand or notice as herein provided, and it being further understood that I shall at all times be liable for the payment of any debit balance owing in my account(s) with you upon demand, and that I shall be liable for any deficiency remaining in any such account(s) in the event of the liquidation thereof in whole or in part by you or by me.

I represent that I am more than twenty one years of age.

All communications, whether by mail, telegraph, telephone, messenger or otherwise, sent to me at my address as given to you from time to time shall constitute personal delivery to me.

It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange). Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal. (OVER)

This agreement and its enforcement shall be governed by the laws of the State of New York.

This agreement shall also inure to the benefit of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer my account to any such successors or assigns.

This agreement shall continue until signed notice of revocation is received by or from me, and in case of such revocation it shall continue effective as to transactions entered into prior thereto.

Date _____ (Signature) Harold S Ames

COMMODITY ACCOUNT AGREEMENT

1975 NOV 26 P 3:44

CMD 27 DG

UNREGULATED
REGULATED

NAME

ACCOUNT NO. 545-81652

080-16-5478

080-16-5478 2505 645-81652
MR. HAROLD S. AMES
C/O NON FERROUS INTERNATIONAL
CORP.
300 PARK AVE
NEW YORK, N. Y. 10022

(OVER)

Exhibit 4 Annexed to Affidavit
of James J. Dolan

Constitution of the New York Stock Exchange, Inc.

ARTICLE I

Title—Objects—Definitions

Title

SEC. 1. The title of this Corporation shall be the "NEW YORK STOCK EXCHANGE, INC."

Amendment.
Adopted February 12, 1971; effective February 18, 1971

Objects

SEC. 2. Its objects and purposes shall be:

(a) to furnish exchange rooms for the convenient transaction of their business by its members; to furnish other facilities for its members, allied members, member firms and member corporations; to maintain high standards of commercial honor and integrity among its members, allied members, member firms and member corporations; and to promote and inculcate just and equitable principles of trade and business;

(b) to conduct and carry on the functions of a "board of trade" within the meaning of that term in the New York Not-for-Profit Corporation Law;

(c) to conduct and carry on the functions of an "exchange" within the meaning of that term in the Securities Exchange Act of 1934; and

(d) to conduct and carry on any and all activities incidental to the foregoing which may lawfully be conducted and carried on by a corporation of its type formed under the New York Not-for-Profit Corporation Law.

Amendments.
March 26, 1970.
Adopted February 12, 1971; effective February 18, 1971.

Definitions

SEC. 3. Unless the context requires otherwise, the terms defined in this Section shall, for all purposes of the Constitution, have the meanings herein specified:

Member

(a) The term "member" means a member of the Exchange, and does not include within its meaning an allied member of the Exchange.

Membership

(b) The term "membership" refers to the members of the Exchange, and does not refer to the allied members.

Member firm

(c) The term "member firm" means a firm, transacting business as a broker or a dealer in securities, at least one of whose general partners is a member of the Exchange or which has the status of a member firm by virtue of permission given to it by the Board of Directors pursuant to the provisions of Section 13(a) of Article IX.

Allied member

(d) The term "allied member" means:

(*i*) a general partner in a member firm who is not a member of the Exchange and who has become an allied member as provided in Article IX, or

(*ii*) an employee of a member corporation who is actively engaged in its business and devotes the major portion of his time thereto, who is

not a member of the Exchange, who has become an allied member as provided in Article IX, and who is either:

(*a*) a director and a holder of record and beneficial owner of voting stock of such corporation, or

(*b*) a principal executive officer and a holder of record and beneficial owner of voting stock of such corporation, or

(*c*) a holder of record and beneficial owner of 5% or more of the outstanding voting stock of such corporation.

Non-member

(e) The term "non-member" means a party not a member, allied member, member firm or member corporation.

Member corporation

(f) The term "member corporation" means a corporation, transacting business as a broker or dealer in securities, approved by the Board of Directors as a member corporation, having at least one member of the Exchange who is an officer thereof and a holder of voting stock therein, and having all its other Exchange members officers thereof and holders of Voting stock therein. A corporation shall cease to be a member corporation if the approval of the Board of Directors is withdrawn or if it shall cease to transact business as a broker or dealer in securities or to have all its Exchange members officers thereof and holders of voting stock therein, unless the corporation has the status of a member corporation by virtue of permission given to it by the Board of Directors pursuant to the provisions of Section 13(b) of Article IX.

Approved person

(g) The term "approved person" means a party who is not an employee, a member or an allied member of a member corporation, who has become an approved person as provided in Article IX, and who is a director of a member corporation, or who beneficially owns 5% or more of the outstanding voting stock of a member corporation.

Freely transferable security

(h) The term "freely transferable security" means (*i*) any stock which on its face may be transferred without it being necessary that the Exchange approve the transferee, and (*ii*) any debt instrument which on its face may be transferred without it being necessary that the Exchange approve the transferee and which evidences a liability subordinated to general creditors as approved by the Exchange.

Voting stock

(i) The term "voting stock" means stock in a corporation the holders of which are entitled to vote for the election of the directors of such corporation.

Non-voting stock

(j) The term "non-voting stock" means stock of any class in a corporation other than voting stock.

Entire Board

(k) The term "entire Board" means the total number of Directors which the Exchange would have if there were no vacancies.

Amendments.
December 4, 1958.
July 5, 1957.
March 7, 1963.
March 26, 1970.
Adopted February 12, 1971; effective February 18, 1971.
Adopted March 1, 1972.
November 22, 1972.

ARTICLE VIII

Arbitration

Controversies Arbitrated

SEC. 1. Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member firm or member corporation, shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Directors.

Amendment.

Adopted March 1, 1972.

Procedure and Costs

SEC. 2. The Board of Directors, in accordance with the provisions of Section 5 of Article III, shall adopt rules governing the procedure for arbitration through the facilities of the Exchange, which, among other matters, shall fix the maximum amount chargeable to the parties as costs to cover the expense of the hearings, which shall include the fees of the Arbitrators, and may from time to time amend, alter or repeal any rule so adopted.

Amendment.

Adopted March 1, 1972.

Arbitration Director

SEC. 3. The Chairman of the Board, subject to the approval of the Board of Directors, shall designate one of the officers or other employees of the Exchange as Arbitration Director, and may also designate an employee of the Exchange as Assistant Arbitration Director, to act in the absence or inability to act of the Arbitration Director. The Arbitration Director shall be charged with the duty of performing all ministerial duties in connection with matters submitted for arbitration pursuant to this Article.

Amendment.

Adopted March 1, 1972.

Arbitrators

Board of Arbitration

SEC. 4. Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of members and allied members of the Exchange who are not members of the Board of Directors as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual election of the Exchange and their successors are appointed and take office.

Amendment.

Adopted March 1, 1972.

Panels of arbitrators

The Chairman of the Board of Directors shall from time to time appoint two panels of arbitrators, composed of persons who are residents of or have their places of business in the Metropolitan area of the City of New York. The first of such panels shall be composed of persons engaged in the securities business and the second of such panels shall be composed of persons not engaged in the securities business. The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.

Amendments.

February 26, 1970.

Adopted March 1, 1972.

Amended June 26, 1975 effective August 1, 1975.

Member Controversies

SEC. 5. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration provided for by Section 4 of this Article, and the decision of a majority of the Arbitrators selected to hear and determine the controversy shall be final. If the amount (exclusive of interest and costs) involved in the controversy is less than $100,000 the controversy shall be heard by three Arbitrators. If such amount is $100,000 or more the controversy shall be heard by five Arbitrators. The parties may elect to have the controversy heard by one arbitrator, if the amount involved is $2,500 or less. All such proceedings shall be held in the City of New York.

Amendments.

February 26, 1970.

Adopted March 1, 1972.

Amended June 26, 1975 effective August 1, 1975.

Non-member Controversies

SEC. 6. Any controversy between a non-member and a member or allied member or member firm or member corporation, arising out of the business of such member, allied member, member firm or member corporation or the dissolution of a member firm or a member corporation shall, at the instance of such non-member, be submitted for arbitration as provided hereinbelow. If the proceedings are to be held in the City of New York, the controversy shall be heard and determined as follows:

(a) If the amount involved (exclusive of interest and costs) is less than $10,000, by three Arbitrators, to be selected by lot, by the Arbitration Director, as follows: one Arbitrator from the Board of Arbitration or from the first of the panels and two Arbitrators from the second of the panels provided for by Section 4 of this Article; or

(b) If the amount involved (exclusive of interest and costs) is more than $10,000, by five Arbitrators, to be selected by lot, by the Arbitration Director, as follows: one Arbitrator from the Board of Arbitration, one Arbitrator from the first of the panels and three Arbitrators from the second of the panels provided for by Section 4 of this Article; or

(c) If the non-member elects the Board of Arbitration to hear and determine the controversy and the amount (exclusive of interest and costs) involved is less than $100,000, by three Arbitrators, or

(d) If the non-member elects the Board of Arbitration to hear and determine the controversy and the amount involved is $100,000 or more, by five Arbitrators; or

(c) Upon the written consent of all parties, a controversy may be heard by one member of the Board of Arbitration when the amount (exclusive of interest and costs) involved is $2,500 or less.

Arbitration proceedings pursuant to this Section shall be held in the City of New York, except as may be otherwise provided in the rules of the Board of Directors.

Proceedings held outside City of New York

If the proceedings are to be held outside the City of New York, such Arbitrators shall be selected, from panels appointed for service outside the City of New York, by the Arbitration Director, as follows:

(a) If the amount in controversy (exclusive of interest and costs) is less than $10,000: one Arbitrator from the first of such panels and two from the second of such panels provided by Section 4 of this Article; or

(b) If the amount in controversy (exclusive of interest and costs) is $10,000 or more: two Arbitrators from the first of such panels and three Arbitrators from the second of such panels provided for by Section 4 of this Article.

Majority decision final

The decision of a majority of the Arbitrators shall be final.

Amendments.

February 26, 1970.

Adopted March 1, 1972.

Amended June 26, 1975 effective August 1, 1975.

Provisions Applicable to All Controversies

SEC. 7. All arbitration proceedings shall be conducted in such manner and pursuant to such rules as the Board of Directors shall from time to time adopt.

Power to decline use of facilities

The Board of Directors may decline in any case to permit the use of the arbitration facilities of the Exchange pursuant to this Article and may delegate such power in accordance with the provisions of Section 1 of Article III.

Dismissal of proceedings; assessment of costs

The Arbitrators in any case may at any time during the proceedings, and shall upon the joint request of the parties thereto, dismiss the proceedings and refer the parties to their remedies at law. In any arbitration proceeding, whether involving a member controversy or a non-member controversy, the Arbitrators may determine, subject to the rules of the Board of Directors, the amount chargeable to the parties as costs, to cover the expense of the hearings, and, upon the determination of such controversy, shall determine by whom such costs shall be borne or may in their discretion remit all or any part thereof. Where the expense of the hearings exceeds the amount chargeable to the parties as costs, such excess shall be borne by the Exchange.

No right of appeal

There shall be no appeal to the Board of Directors from a decision of the Arbitrators in any arbitration proceeding.

Amendment.
Adopted March 1, 1972.

Arbitration

(Rules and Policies Administered by the Office of the Secretary.)

Initiation of Proceedings

Statement of claim

Rule 481. A member, allied member, a member organization, or a non-member who wishes to institute proceedings pursuant to the provisions of Article VIII of the Constitution against any such person or organization shall file with the Arbitration Director a concise statement of claim or controversy.

Where the parties to a controversy have previously entered into an agreement to arbitrate future disputes in accordance with the procedure of the Exchange, or a court has issued an order directing such an arbitration, proceedings may be instituted by either party filing with the Arbitration Director a concise statement of claim or controversy, together with a copy of the agreement providing for arbitration or court order and moving papers.

The statement of claim or controversy shall specifically set forth the matters to be arbitrated and, if possible, the amount claimed.

Reply and counterclaim

A copy of the statement filed by the party initiating the proceeding shall be furnished by the Arbitration Director to the opposing party for reply. Said reply shall be filed with the Arbitration Director within ten days of the receipt by such opposing party of said statement, or such longer period as may be granted by the Exchange. In the event that the opposing party wishes to assert a counterclaim, said reply shall contain a statement of counterclaim, which shall specifically set forth the matter to be arbitrated and, if possible, the exact amount of said counterclaim. The initiating party shall be given the same opportunity to reply to the counterclaim as was given the opposing party in the case of the original statement of claim or controversy.

Submission

If the Exchange does not decline to accept jurisdiction, a copy of the statement of claim or controversy and the reply, and counterclaim if any, and reply to the counterclaim, shall be attached to a form of submission prescribed by the Exchange, which shall be sent to the parties and shall be executed and acknowledged by the parties before an officer duly authorized by law. Said submission shall be promptly filed with the Arbitration Director.

Where a copy of an agreement between the parties to arbitrate future disputes in accordance with the procedure of the Exchange, or a copy of a court order directing such an arbitration, has been filed with the Exchange, the Exchange may accept such agreement or order in lieu of requiring the execution of a submission.

Amendment.
March 26, 1970.

Costs

Rule 482. The maximum amount chargeable to the parties as costs to cover the expense of the hearings shall not exceed the following, which amount shall be deposited with the Exchange by the party initiating a proceeding upon institution of proceedings or prior to each subsequent hearing, as the case may be, unless such requirement is waived by the Exchange for a non-member party.

Where the amount (exclusive of interest and costs) involved in the controversy is:

	Member Controversy	Non-Member Controversy
$500 or less	$350 per hearing	$50
More than $500 but not more than $1,000	$350 per hearing	$100
More than $1,000 but less than $2,500	$350 per hearing	$120
$2,500 or more but less than $5,000	$350 per hearing	$180
$5,000 or more but less than $10,000	$350 per hearing	$180 per hearing
$10,000 or more but less than $20,000	$350 per hearing	$240 per hearing
$20,000 or more but less than $100,000	$350 per hearing	$350 per hearing
$100,000 or more	$550 per hearing	$350 per hearing

Where the amount (exclusive of interest and costs) involved in the controversy is less than $2,500 and the optional procedure of one Arbitrator is elected:

	Member Controversy	Non-Member Controversy
Less than $500	$100	$25
$500 or more but less than $1,000	$100	$50
$1,000 or more but less than $2,500	$100	$60

Where the controversy does not involve a money claim, the costs and the amount to be deposited, shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed $550 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain $25 of the deposit of costs submitted.

Amendments.

Amended June 26, 1975 effective August 1, 1975.

Representation by Attorney

Rule 483. A party is not required to be represented by an attorney at any stage in an arbitration including the hearings. However, a party has a right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. A party who is to be represented by an attorney shall so notify the Arbitration Director and shall also furnish him with the attorney's name and address in the statement of claim or reply or reply to a counterclaim, as the case may be, or if the right to representation by an attorney is claimed subsequent to the filing of the statement of claim or reply or reply to a counterclaim, by a written notice to the other party or parties and the Arbitration Director. After the Arbitration Director has received such notification from a party, subsequent papers in the proceeding to be served on such party shall be served upon his attorney.

¶ 2484 Election of Arbitrators

Rule 484. If the non-member party to a proceeding does not signify in the statement of claim or the reply, as the case may be, or within five days after he is requested to do so by the Exchange, whichever is later, whether he elects to have the controversy adjudicated by Arbitrators selected from the Panels of the Exchange or by members of the Board of Arbitration, he shall be deemed not to desire to make the election permitted him under Article VIII, Section 6, of the Constitution [¶ 1356] and the Arbitrators shall be selected by lot from the Panels of the Exchange, pursuant to said section.

¶ 2485 Time and Place of Hearing

Rule 485. The Arbitration Director shall appoint a time and place for the hearing and shall cause notice thereof to be given to each of the parties as provided in Rule 487 [¶ 2487] of the Board of Directors. If any of the parties, after due notice, fails to be present or represented at a hearing or any adjourned hearing, the Arbitrators may, nevertheless, in their own discretion, proceed with the adjudication of the controversy.

Procedure at hearing

At the hearing, the statements of the parties shall be read to the Arbitrators, unless such reading shall be specifically waived by the parties or their attorneys-in-fact of counsel; each of the parties or his attorney-in-fact or counsel shall be permitted to make an opening statement, present witnesses and documentary evidence, and present closing arguments orally or in writing as may be determined at the hearing by the Arbitrators. Witnesses shall be subject to examination by the opposing party or his attorney-in-fact or counsel. The hearings shall be formally declared closed by the Arbitrators. Such hearings may, in the discretion of the Arbitrators, be reopened at any time prior to the making of an award.

Amendments to claims or counterclaims

At any time during the hearings or before the hearings are declared closed, any party may move the amendment of his claim or counterclaim, and, if the

Arbitrators shall permit, such amendment shall be incorporated forthwith in an amendment to the submission or, where a submission was not required, in an amendment to the statement of claim or counterclaim, as the case may be.

Adjournments

The Arbitrators may adjourn the hearings from time to time upon the application of either party or at their own instance.

Amendments.

Amended June 26, 1975 effective August 1, 1975.

Award of Arbitrators—Costs

Rule 486. The award of the Arbitrators shall be made in writing and shall be acknowledged in like manner as a deed to be recorded.

The Arbitrators in the award shall fix the amount of costs chargeable to the parties to cover the expense of the hearings, and shall determine the manner in which and by whom such costs shall be borne.

Notices and Communications

Rule 487. Notices may be given to the parties by the Arbitration Director or otherwise as the Arbitrators may direct.

Notices of hearings shall be given to the parties or their attorneys-in-fact or counsel in writing personally or by registered or certified mail at least ten days in advance of such hearing, unless such notice is waived by the parties or their attorneys-in-fact or counsel. Notice of an adjourned hearing may be given orally by the Arbitrators at any preceding hearing.

All other notices, orders, papers and communications, including a copy of the award, may be served on any party by delivering or mailing the same to the party or his attorney-in-fact or counsel.

Oaths of Arbitrators and Witnesses

Rule 488. Before proceeding with an Arbitration, an oath shall be administered to the Arbitrators in the presence of the parties, except where the parties or their attorneys-in-fact or counsel continue the arbitration without objection to the failure of the Arbitrators to take the oath, or where the oath is waived in writing by the parties to the submission or their attorneys-in-fact or counsel.

Witnesses shall be sworn before testifying, unless the taking of an oath is waived by the parties or their attorneys-in-fact or counsel.

Subpoenas

Rule 489. The Arbitrators and any attorney of record in the arbitration proceeding shall have such powers of subpoena as may be provided by law, but so far as it is possible for them to do so, the parties shall produce witnesses and present proofs without the issuance of subpoena.

Constitution and Rules Part of Submission

Rule 490. The provisions of Article VIII of the Constitution and of Rules 481-491 of the Board of Directors shall be deemed to be a part of the submission and the parties shall be bound hereby, except that, with the prior consent of the Exchange, the parties may otherwise agree, in so far as the Rules of the Board are concerned.

Interpretation of Rules

Rule 491. During the course of proceedings, the Arbitrators in a particular case shall have the power to interpret and apply Rules 481-491 of the Board of Directors and the provisions of the submission and such interpretation shall be binding upon the parties.

Form of Submission

NEW YORK STOCK EXCHANGE, INC.

In the Matter of the Arbitration between } SUBMISSION

We, the undersigned parties, hereby submit to arbitration by Arbitrators selected in accordance with Paragraph { IV. A. 1. / IV. A. 2. / IV. B. 1. / IV. B. 2. / IV. B. 3. } of the within submission the matter in controversy between us and all the matters, claims and counterclaims relating thereto, set forth in the statements of the parties, annexed hereto, and we agree to abide by and perform any award rendered pursuant to this agreement, and we do further agree that a judgment of ..... may be entered on said award and to that end do voluntarily submit ourselves to the jurisdiction of said court.

We further agree that the above entitled arbitration shall be held at a place to be designated by said Arbitrators in the City of and State of , and shall be conducted in accordance with the following:

(Here is set forth the text of Article VIII of the Constitution

RULES AND PROCEDURE

I. Institution of Proceedings

(Here is set forth the text of Rule 481 *of the Board of Directors)*

II. Costs

(Here is set forth the text of Rule 482 *of the Board of Directors)*

III. Counsel

(Here is set forth the text of Rule 483 *of the Board of Directors)*

IV. Arbitrators

A. Member Controversies. In the case of a controversy between members, allied members, member firms or member corporations, the Arbitrators shall be members of the Board of Arbitration. If the amount (exclusive of interest and costs) involved in the controversy is less than $100,000 the controversy shall be heard by three Arbitrators. If the amount is $100,000 or more the controversy shall be heard by five Arbitrators.

B. Non-Member Controversies. In the case of a controversy between a non-member and a member, allied member, member firm or member corporation, the Arbitrators shall be

1. three or five persons selected from the panels of the Exchange, as provided in Section 6 of Article VIII of the Constitution; or, at the election of the non-member, made in the submission.
2. three members of the Board of Arbitration if the amount (exclusive of interest and costs) involved is less than $100,000;
3. five members of the Board of Arbitration if the amount (exclusive of interest and costs) involved is $100,000 or more.

(Here is set forth the text of Rule 484 of the Board of Directors)

Amendments.

Amended June 26, 1975 effective August 1, 1975.

V. Place of Hearings

A. Member Controversies. Controversies between members, allied members, member firms or member corporations shall be heard in New York City.

B. Non-Member Controversies. Controversies between a non-member and a member, allied member, member firm or member corporation, shall be heard in New York City, except, where controversies involve any parties who are located outside of New York City, the Exchange may, at the request of the non-member, designate some other place in the United States.

VI. Hearings

(Here is set forth the text of Rule 485 of the Board of Directors)

VII. Award

(Here is set forth the text of Rule 486 of the Board of Directors)

VIII. Notices and Communications

(Here is set forth the text of Rule 487 of the Board of Directors)

IX. Oath of the Arbitrators and Witnesses

(Here is set forth the text of Rule 488 of the Board of Directors)

X. Subpoenas

(Here is set forth the text of Rule 489 of the Board of Directors)

XI. Constitutional Provisions and Rules Part of Submission

(Here is set forth the text of Rule 490 of the Board of Directors)

XII. Interpretation of Rules

(Here is set forth the text of Rule 491 of the Board of Directors)

XIII. Amendment to Rules

The Board of Directors may from time to time amend, alter or repeal any of the Rules of the Board with respect to arbitration, either generally or in reference to a particular case, as it in its sole discretion may find expedient.

[There are attached to the submission, prior to its execution, the statements of claim and the reply. The submission form contains provision for the signatures of the parties and proper acknowledgment of such signatures.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD AMES,

Plaintiff,

-against-

Index No. 76 Civ.3085
(Judge Haight)

MERRILL LYNCH, PIERCE, FENNER & SMITH INC. and CHRISTOPHER V. STREIT,

Defendants.

AFFIDAVIT OF CHRISTOPHER V. STREIT

STATE OF NEW YORK

COUNTY OF NEW YORK

CHRISTOPHER V. STREIT, being duly sworn, deposes and says:

I am one of the defendants in this action. I am employed by Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") as a registered representative in the position of Commodity Account Executive at its branch office at 260 Madison Avenue, New York City. I know the plaintiff, Harold Ames, and I am the person who serviced Ames' account during the period covered by the Complaint.

Ames opened an account with Merrill Lynch on or about November 24, 1975. At that time, he furnished information indicating that he was the President and Chief Executive Officer of NonFerrous International Corp. which is in the business of importing and exporting nonferrous metals, among other things, and whose name suggests that it deals in copper. At the time, Ames' annual income was approximately $500,000 and estimated

net worth approximately $2,130,000, and he had an estimated $100,000 risk capital for commodity trading. I knew Ames for approximately three years prior to his opening the account. Prior to opening the account, which was not discretionary, I explained to Ames the risk of commodity futures trading, advising him that he could lose his entire risk capital. Ames told me he was experienced in the commodities business, and that he had a commodity options account with Rudolf Wolff & Co. Inc. of London. In my opinion, Ames is very knowledgeable and experienced in commodity trading.

On or about November 24, 1975, in Ames' office at 300 Park Avenue, New York City, Ames delivered to me a $100,000 check as the first deposit of funds into his account, and a signed Commodity Account Agreement (copy annexed as Exhibit A), which contains the following provision, among others:

> "It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any Security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange)."

After the account was established, Ames traded actively in commodity futures, principally copper. A commodity future is a standardized contract for purchase or sale of a fixed quantity of a commodity of designated grade, for delivery in a specified future month at a price agreed

upon when the contract is made. Orders for the contracts in the Ames account were usually placed on the telephone, and written up in my office. Orders are forwarded by wire to the exchange where they are bought and sold by use of the auction system. Copper futures are bought and sold on the Commodity Exchange Inc. in New York; lumber on the Chicago Mercantile Exchange; and plywood on the Chicago Board of Trade. Futures contracts are "cleared" through the exchange, or its affiliated clearing house, which becomes seller to each buyer and buyer to each seller. Brokers post margins with the clearing houses which recompute them daily. Price quotations appear in the financial pages of many newspapers and other publications. Ames paid for his transactions by checks which were frequently mailed to Merrill Lynch. Reports of transactions were frequently given to Ames by telephone and written confirmations of purchases and sales were always sent to Ames by mail.

Affidavit of Christopher V. Streit

I join in Merrill Lynch's motion to dismiss the complaint and to compel arbitration. In connection with the application to compel arbitration, I consent to the submission of this controversy to arbitration and I will be available at the hearing before the arbitration panel to give testimony.

Christopher V. Streit

CHRISTOPHER V. STREIT

Subscribed and sworn to
this 2nd day of September 1976

James J. Dolan

JAMES J. DOLAN
Notary Public, State of New York
No. 30-0980475 Qual. in Nassau Co.
Commission Expires March 30, 1977

Exhibit A Annexed to Affidavit
of Christopher V. Streit

CODE 01R-6-67 **COMMODITY ACCOUNT AGREEMENT**

Merrill Lynch, Pierce, Fenner & Smith Incorporated

In consideration of your acting as broker for the undersigned, I hereby consent and agree that

Any and all transactions shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market (and its clearing house, if any), where executed.

Any and all commodities or contracts relating thereto, now or hereafter held or carried by you for me, (either individually or jointly with others) are to be held by you as security for the payment of any liability of mine to you.

You shall have the right, whenever in your discretion you consider it necessary for your protection, or in the event that a petition in bankruptcy, or for the appointment of a receiver, is filed by or against me, or an attachment is levied against my account(s) with you, or in the event of my death, to sell any or all commodities in my account(s) (either individually or jointly with others) to buy any or all commodities which may be short in such account(s) and to close any or all outstanding contracts, all without demand for margin or additional margin, notice of sale or purchase, or other notice or advertisement, and any such sales or purchases may be made at your discretion on any exchange or other market where such business is then usually transacted, and on any such sale you may be the purchaser for your own account. It being understood that a prior demand, or call, or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or to buy without demand or notice as herein provided, and it being further understood that I shall at all times be liable for the payment of any debit balance owing in my account(s) with you upon demand, and that I shall be liable for any deficiency remaining in any such account(s) in the event of the liquidation thereof in whole or in part by you or by me.

I represent that I am more than twenty one years of age.

All communications, whether by mail, telegraph, telephone, messenger, or otherwise, sent to me at my address as given to you from time to time shall constitute personal delivery to me.

It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any Security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange). Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal.

(OVER)

This agreement and its enforcement shall be governed by the laws of the State of New York.

This agreement shall also inure to the benefit of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer my account to any such successors or assigns.

This agreement shall continue until signed notice of revocation is received by or from me, and in case of such revocation it shall continue effective as to transactions entered into prior thereto.

Date _____ (Signature) Harold S Ares

COMMODITY ACCOUNT AGREEMENT

1975 NOV 26 P 3:44

CMD 27 DG

UNREGULATED
REGULATED

NAME

ACCOUNT NO. 645-01652

080-16-5478

080-16-5478 2505 645-01652
MR. HAROLD S. ARES
C/O NON FERROUS INTERNATIONAL
CORP.
300 PARK AVE
NEW YORK, N. Y. 10022

(OVER)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD AMES,

Plaintiff,

-against-

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and CHRISTOPHER V. STREIT,

Defendants.

76 Civ. 3085-CSH

MEMORANDUM OPINION AND ORDER

45709

Appearances:

LOWENTHAL, LANDAU, FISCHER & SINGER, P.C.
Attorneys for Plaintiff
250 Park Avenue
New York, New York 10017
Barry H. Singer, Esq.
Lawrence L. Ginsburg, Esq.,
Of Counsel

MICROFILM
MAR 7

JAMES J. DOLAN, ESQ.
Attorney for Defendants
165 Broadway
New York, New York 10006

HAIGHT, District Judge:

Defendants move this Court for an order, pursuant to F.R.Civ.P. 8(a)(1) and 12(b)(1), dismissing plaintiff's complaint for lack of subject matter jurisdiction, or, in the alternative, for an order pursuant to 9 U.S.C. §3 staying the trial of this action and compelling arbitration.

Plaintiff commenced this action, seeking money damages for alleged violations of the Commodity Exchange Act, to wit, 7 U.S.C. §§6b and 60. It is averred that jurisdiction is predicated on the Commodity Exchange Act, 7 U.S.C. §2 et seq., as amended by the Commodity Futures Trading Commission Act of 1974 and regulations promulgated thereunder, and upon principles of pendent jurisdiction. It should be noted at the outset that the sufficiency of plaintiff's jurisdictional allegations serve as the basis of defendants' motion to dismiss pursuant to 8(a)(1) and 12(b)(1), F.R.Civ.P.

Before addressing the merits of defendants' application, some background information about the nature of plaintiff's claims might prove helpful.

Plaintiff is a resident and citizen of the State of New York, and maintains his office within the Southern District of New York. Defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merill, Lynch") is a Delaware corporation engaged in the business of securities and commodities dealing and brokerage, maintaining its principal offices in the Southern District of New York. Defendant Christopher V. Streit is engaged as the Commodity Department Manager at Merrill, Lynch in New York.

It is alleged that plaintiff and defendants agreed to an investment program whereby plaintiff was to invest in certain copper futures contracts. The terms of the alleged program are set forth in ¶6-8 of plaintiff's complaint:

"6. [D]efendants proposed to plaintiff a program pursuant to which plaintiff would take a hedge position in copper futures contracts. Defendants proposed that plaintiff purchase 200 to 300 May copper contracts and sell short 200 to 300 December copper contracts.

"7. Plaintiff authorized defendants to execute transactions to effect the hedge position proposed by defendants on the condition that the price spread of this six month hedge be no less than 3 cents per pound.

"8. At or about the same time, defendants also proposed that plaintiff invest in 20 to 30 copper contracts without a hedge."

Plaintiff contends that the agreed to commodities investment program was to be governed by the explicit limitations set forth above, unless plaintiff and his business advisor were consulted, and their express approval obtained prior to any change in the program.

As a result of these discussions, plaintiff opened a non-discretionary regulated commodities account and securities account with defendant Merrill, Lynch. To fulfill the requirements of the proposed program, plaintiff transferred to his securities account the sum of $100,000 to be invested in United States Treasury Bills, said investment to serve as margin for the proposed commodities transactions.

Plaintiff avers that sometime after January 1976, defendants deviated from the agreed upon commodities program—that instead of restricting plaintiff's investment to the agreed upon "300 contract hedge position and the 40 contract long position in copper contracts", defendants executed, on behalf of plaintiff's account,

copper contracts. Plaintiff further contends that these
ged diversions from the commodities program were undertaken
arily for the purpose of generating commissions for defend-
which it is alleged, "constituted excessive trading unrelated
e needs and objectives of plaintiff and disproportionate to
ize and character of the account, [which] disregarded the
ests of plaintiff and had no substantial likelihood of re-
ng in a profit to plaintiff." [1]

Plaintiff further avers that inquiries directed to de-
nts concerning the financial status of the commodities
nt resulted in false and misleading reports, wherein defend-
assured plaintiff that his investments were prospering, and
defendants were adhering to the agreed upon commodities program.
tiff asserts that defendants knew that these reports were false
nade, and that in fact defendants were executing contracts
fell outside the ambit of the agreed to commodities program.[2]
onally, it is contended that defendants executed plywood
mber futures contracts for the account of plaintiff—such
actions also falling outside the scope of the commodities
m.[3] As a result of these alleged deviations and misleading
s, plaintiff seeks damages amounting to $125,000.

Defendants have denied the material allegations set
in plaintiff's complaint, see Answer of defendants Merrill,
and Christopher V. Streit, ¶5.

The instant application by defendants is addressed to
sues: first, that plaintiff has failed to set forth a short

and plain statement of the grounds upon which the Court's jurisdiction depends pursuant to F.R.Civ.P. 8(a)(1); and secondly, that any claims set forth in plaintiff's complaint must be submitted to arbitration pursuant to the terms of the Commodity Account agreement signed by plaintiff herein.

Addressing the jurisdictional aspect of defendants' motion, Rule 8(a)(1), F.R.Civ.P., provides:

> "(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court s jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it."

In the case at bar, it cannot be gainsaid that plaintiff bases jurisdiction in this Court on the provisions of either 28 U.S.C. §1331 or §1337. True it is that plaintiff's jurisdictional allegations fall short of the verbiage of Official Form 2(b) as set forth in 2A Moore, Federal Practice ¶8.09[1] p. 1647 (1962); but equally true are the words of Professor Moore when he stated that "the claimant is master of his action to the extent that he may decide what law he will rely upon and the court must look to the way his claim is pleaded to see if a substantial federal question is there presented." Id at 1647, 1648.

Plaintiff's reliance on the provisions of the Commodity Exchange Act, 7 U.S.C. §2, coupled with an ad damnum clause in excess of $10,000, exclusive of interest and costs, perforce leads

this Court to conclude that jurisdiction is predicated on the provisions of 28 U.S.C. §1331(a) which states:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

As a matter of fact, defendants have not disputed that plaintiff can assert a private right of action under the Commodity Exchange Act, see Defendants' Reply Memorandum p. 3.

In any event, the averments of plaintiff's complaint clearly embrace the jurisdictional requirements of 28 U.S.C. §1337 which provides that:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

In construing §1337 relative to a claim under the Commodities Exchange Act, the court in Gould v. Barnes Brokerage Co., 345 F.Supp. 294, 295 (N.D.Texas 1972) noted:

> "This section has been construed to provide jurisdiction in many types of cases. It has been construed to support jurisdiction of cases brought under both the Agricultural Adjustment Act, 7 U.S.C. §1281 et seq., and the Soil Bank Act, 7 U.S.C. §1801 et seq. Though there are no cases in point, the court concludes that jurisdiction under the Commodity Exchange Act may also be predicated on §1337." (emphasis added) (footnotes omitted).

I conclude, therefore, that jurisdiction of the instant action is rightfully found in this Court, and as to that aspect of defendants' motion seeking dismissal pursuant to F.R.Civ.P. 8(a)(1), I must deny that application.

Defendant next relies on the provisions of 9 U.S.C. §3 which provides for a stay of litigation brought in a district court, when the subject matter of such a lawsuit is properly referable to an arbitration forum.

In this regard, defendants rely on the language expressed in the Commodity Account Agreement, signed by plaintiff at the time he opened his account with Merrill, Lynch. The relevant portion of that agreement reads as follows:

> "It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any Security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange)."

9 U.S.C. §3 states:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such

> suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

It is axiomatic that once federal jurisdiction over the parties and subject matter is established, all issues relating to the enforcement of an arbitration clause in an agreement are governed by federal rather than local law, see Metro Industrial Painting Corp. v. Terminal Construction Co., Inc., 181 F.Supp. 130 (S.D.N.Y. 1960).

Unquestionably there is ample authority supporting the proposition that federal law supports a duty to arbitrate when an agreement so provides for such a remedy for disputes.

Exceptions to this general rule have been carved out, however, and it is upon two of these exceptions that plaintiff relies in urging denial of defendants' 9 U.S.C. §3 application. Firstly, plaintiff refers this Court to the provisions of 7 U.S.C. §7a(11), which he contends evinces a Congressional intent to limit the circumstances under which arbitration machinery can be used to adjudge disputes arising out of the trade of commodities.

§7a(11) provides that:

> "Each contract market shall—
>
> "(11) provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: Provided, That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be

> applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term 'customer' as used in this paragraph shall not include a futures commission merchant or a floor broker..."

7 U.S.C. §7a(11) was one provision of the overall Commodity Futures Trading Commission Act of 1974, the legislative purpose of which was set forth in Pub.L. 93-463, 1974 U.S. Code Cong. and Adm. News, p. 5843, 5844.

> "H.R. 13113 makes extensive changes in the Commodity Exchange Act, brings under Federal regulation all agricultural and other commodities, goods, and services traded on exchanges, and otherwise strengthens the regulation of the nation's $500 billion commodity futures trading industry.
>
> "The bill is designed to further the fundamental purpose of the Commodity Exchange Act in insuring fair practice and honest dealing on the commodity exchanges and providing a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves."

As applied to the facts herein, 7 U.S.C. §7a(11) would seem to have little effect on the instant dispute. Basically §7a(11) provides for the setting up of an effective mechanism by which claimants can adjudicate relatively small commodities claims. Nowhere in §7a(11) is there any provision precluding arbitration of any dispute exceeding $15,000, or in any way preempting the provisions of Chapter 9 of the United States Code.[4] See Milani v. Conti Commodity Services, Inc., et al, (N.D.Calif. 1976) as reported

in 35 CCH Commodity Futures Law Reports ¶20,227 (November, 1976); Arkoosh v. Dean Witter & Co. Inc., (Dist. of Neb. 1976) as reported in 24 CCH ¶20,170, wherein it was stated:

> "It is eminently clear that Congress intended to prohibit a contract market from establishing any rule or regulation which would require customers to submit to the binding arbitration of the market itself. 7 U.S.C.A. §7a(11). Such a rule would be clearly involuntary and violative of the Act. It is also reasonable to conclude that Congress did not intend for the prohibitions of §7a(11) to be circumvented by the simple expedient of requiring commodity traders to agree to arbitration by the contract market in a standard form 'Customer Agreement' as a condition precedent to trading on the contract market. However, this case does not involve an agreement to submit to the binding arbitration of the contract market. Involved here is an agreement to submit to arbitration by one of three private and disinterested organizations. So far as this Court can tell, Congress had no evidence before it suggesting that such private arbitration was a burden upon commodity future trading." (emphasis added).

Under the same Commodity Futures Trading Commission Act of 1974, Congress provided for the establishment of a Commodity Futures Trading Commission to administer and enforce the provisions of the Commodities Act, see 7 U.S.C. §§2 and 4(a). The Commission is authorized to "promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter." See 7 U.S.C. §12(a)(5).

One such rule promulgated by the Commission concerns the voluntariness of arbitration agreements entered into at the time the customer utilized the services of the commodity broker.

17 C.F.R. §180.3, effective November 29, 1976, would, inter alia:

> "(1) require that the use by commodity customers of contract market arbitration or other dispute settlement procedures be voluntary; and
>
> "(2) prohibit agreements between customers and futures commission merchants or other persons registered with the commission which, prior to the time any claim or grievance has arisen, would require submission of future claims or grievances to a binding arbitration procedure, unless the agreement met certain prescribed conditions. (See Statement of William T. Bagley, Chairman, Commodities Futures Trading Commission, 41 Federal Register 42942-42947)."[5]

The Commodity Futures Trading Commission clearly set forth its intention that §180.3 be given retroactive effect. Id at 42944, wherein it was noted:

> "Therefore, the Commission has determined that on the effective date of proposed §180.3(b), all pre-dispute arbitration agreements that do not satisfy the conditions set forth in the proposed rule will be null and void, including those heretofore signed by customers."[6]

The purpose of §180.3 is clear—to prevent the situation where a customer must bargain away legal rights as a "condition precedent" to doing business with a given broker. Unquestionably, §180.3 will serve, in time, to promote uniformity of verbiage in Customer Agreements, while enlightening the commodities customer as to rights and procedures of which he should be aware in the normal course of doing business. While this Court looks favorably upon these aims, it should be remembered that the extent to which retroactivity is accorded to a newly-enacted rule requires con-

sideration of the relative fairness and equities of the issues involved. In the case at bar for instance, a retroactive treatment of §180.3, with its mandatory language as set forth in §180.3(b)(4), would make it impossible for defendants to seek arbitration of the instant claims, notwithstanding the possibility that the provision to arbitrate might have been entered into voluntarily ab initio.

In his treatise on Administrative Law, Professor Kenneth Davis makes the following observations relevant to retroactivity of agency promulgated rules and regulations:

> "Retroactive clarification of uncertain law ordinarily involves no unfairness. It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results. This is why interpretative rules issued after the enactment of a new statute may normally speak as of the time of the statutory enactment. Retroactively applying an original interpretation of an unclear statute is not unfair. Similarly, if administrative and judicial decisions are inconsistent with interpretative rules, injustice seldom results from retroactively changing the interpretative rules to clarify the confusion. New interpretative rules may be changed retroactively without unfairness, whenever the parties should know that the new regulations are experiments.
> "Retroactive change in settled law may be unjust whether the change is made by adminstrative action by a court decision, or by an administrative amendment designed to conform to changes brought about by judicial decisions. The common-law tradition to the contrary notwithstanding, a retroactive change of settled law by judicial decision is just as fair or unfair as a retroactive change of settled law in similar circumstances by administrative or legislative action. Therefore changes in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation. Courts have inherent power to limit decisions to prospective operation; they seldom do so, but they may be doing so more often in very recent years." (Davis, Administrative Law Treatise §5.09 p. 350-352 [1958]) (emphasis added).

As was noted in SEC v. Chenery Corp., 332 U.S. 194, 203 (1947):

> "...[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."

In Retail, Wholesale and Department Store Union, AFL-CIO v. National Labor Relations Board, 466 F.2d 380, 390 (D.C.Cir.1972), the court set down criteria to be used in determining whether retroactivity should be applied:

> "Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."

Applying such reasoning to the case at bar, it cannot be gainsaid that the applicable arbitration provisions in the Customer Agreement at bar do not satisfy the requirements of §180.3(b). For instance, §180.3(b)(2) requires a customer to separately endorse those clause or clauses containing certain cautionary language as set forth in §180.3(b)(4). This requirement has obviously not been met in the instant case, where the

Customer Agreement was signed in 1975, long before the obligatory language of §180.3(b)(4) was drafted, and the necessity of a separate endorsement of such language required.

It is clear to this Court that a strict construction of the provisions of §180.3 to antedated Customer Agreements could lead to unfairness and inequities not intended by the drafters of the Commodity Exchange Act. Assuming arguendo, that the Customer Agreement at bar was entered into voluntarily, this Court could not stay the instant proceedings to afford defendants their contractually agreed to right to arbitrate since the provisions of §180.3 could not have been satisfied.

As was noted by Mr. Justice Goldberg in Greene v. United States, 376 U.S. 149, 160 (1964):

> "[T]he first rule of construction is that the legislation must be considered as addressed to the future not to the past...[and] a retrospective operation will not be given a statute which interferes with antecedent rights...unless such [term] be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Because I believe that retrospective application of §180.3 would serve to prejudice heretofore valid agreements entered into on the basis of existing legal authority, I decline to apply §180.3 retroactively, which would perforce require this Court to deny the benefits of the arbitration provision set forth in the Customer's Agreement, based on language not in existence when the contract was made.

Plaintiff next urges that this Court follow the interpretation of the Commission enunciated in Regulation §180.3 because of the determination of the Supreme Court in Wilko v. Swan, 346 U.S. 427 (1953). Wilko v. Swan was a suit brought to recover damages pursuant to §12(2) of the Securities Act of 1933, 15 U.S.C. §771; said suit arising out of an agreement between Wilko and Hayden, Stone & Co., under which Wilko agreed to purchase on margin a number of shares of a corporation's common stock. Wilko alleged that his purchase was induced by false representations by defendant relevant to the value of the shares, and he commenced suit. Defendant responded that Wilko had agreed to submit all claims to arbitration as was reflected in the margin agreement between the parties. In refusing to compel plaintiff to arbitrate his claims, the Court in Wilko specifically found that the Securities Act of 1933 was "[d]esigned to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale", by creating "a special right to recover for misrepresentation..." (346 U.S. at 431) (footnote omitted). The Court also noted that §14 of the Act provides that:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Based on the above sections, the Court in Wilko held that an agreement to arbitrate could not preclude a buyer of a

security from seeking a judicial remedy under the Act, since an agreement to arbitrate constitutes a stipulation of the kind prohibited under §14.

Notwithstanding plaintiff's urging that the "spirit" of Wilko be applied to the facts herein, it is clear that the statutory basis of Wilko, §12(2) of the Securities Act of 1933, afforded a plaintiff a "special right" of private remedy for civil liability.[7] It is clear that no equivalent "special right" is provided for in the Commodity Exchange Act, as amended; thus depriving this Court of that special circumstance relied on by courts to abandon the judicially favored concept of arbitration.

Unlike the facts in Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970); American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); Macchiavelli v. Shearson, Hammill & Co., 384 F.Supp. 21 (E.D.Cal. 1974); and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the facts of the instant case do not present special policy issues necessitating a judicial prohibition of agreements to arbitrate future disputes.

Power Replacements, Inc., supra, and American Safety Equipment Corp., supra, represent judicial pronouncements regarding the aproposity of arbitration machinery in adjudicating anti-trust claims. The courts in both cases found that special circumstances arise during the litigation of an anti-trust suit. As was noted by the court in American Safety Equipment Corp., supra, and cited with authority by the court in Power Replacements, Inc., supra:

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.***
>
> "***the claim here is that the agreement itself was an instrument of illegality; in addition, the issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest." (391 F.2d at 826, 827).

In Alexander v. Gardner-Denver Co., supra, the Court determined that a right to a trial conferred by Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000(e) et seq. (Supp. V 1975), cannot be prospectively waived in a collective bargaining agreement, the Court noting that:

> "The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. J. I. Case Co. v. NLRB, 321 U.S. 332, 338-339 (1944)." (415 U.S. 36, 52).

Macchiavelli, supra, represents one of the numerous instances where lower federal courts have extended Wilko to include violations of the Securities Act of 1934. In Reader v. Hirsch & Co., 197 F.Supp. 111(S.D.N.Y. 1961), a seminal analysis of the reasons behind applying the rationale in Wilko to violations of the 1934 Act was made. As was pointed out by Judge Dawson in Reader:

> "Three sections of the Act of 1934 expressly provide for civil liability: section 9(e), 15 U.S.C.A. §78i(e); section 16(b), 15 U.S.C.A. §78p(b) and section 18(a), 15 U.S.C.A. §78r(a)...
>
> * * *
>
> "It is important to note that Wilko turned not on the substantive provision, i.e., section 12(2), under which the action was brought, but rather on the forum clause, section 22(a), 15 U.S.C.A. §77v (a), under which a plaintiff was given a wide choice of venue. It was this section, in conjunction with the statute's non-waiver provision, section 14, 15 U.S.C.A. §77n, that caused the Supreme Court to hold the arbitration agreement invalid. The 1934 Act, section 27, 15 U.S.C.A. §78aa, provides that the district courts shall have exclusive jurisdiction of proceedings brought under this chapter, and grants to plaintiffs a relatively wide choice of fori. Similarly the 1934 Act (15 U.S.C.A. §78cc) contains a non-waiver provision which is almost identical with that in the 1933 Act." (197 F.Supp. 111, 114-115).

15 U.S.C.A. §78aa provides in relevant part:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

15 U.S.C.A. §78cc states:

> "(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

A reading of the Commodity Exchange Act, as amended, reveals an absence of the type of provision relied upon by the court in Reader in extending Wilko to the 1934 Act. True it is that there is ample authority for the proposition that "where one violates a legislative enactment by doing a prohibited act and thereby causes injury to another, the latter has a civil right of action of one of the purposes of the statute was to protect interests similar to his own", see Reader v. Hirsch, supra, at p. 114.

Although this Court is not disputing plaintiff's right to commence suit based on the provisions of the Commodity Exchange Act, using the provisions of either 28 U.S.C. §1332 or §1337 as a jurisdictional predicate, the absence of language in the Act bestowing exclusive jurisdiction in federal district courts and a concomitant non-waiver clause compels this Court to conclude that Wilko should not be extended to the case at bar. It is self-evident that Congress did not consider arbitration an anathema to the determination of rights under the Commodity Exchange Act, as amended, see §7a(11) and Arkoosh v. Dean Witter & Co., Inc., supra, wherein it was said:

> "Private arbitration of disputes has been Congressionally 9 U.S.C.A. §2 (1970), and judicially, Barrett v. Manufacturers Ry. Co., 453 F.2d 1305 (8th Cir. 1972), approved for use in all areas of commerce unless such approval is expressly or impliedly withdrawn. Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). In the present case it is difficult to find any justifiable reason, from the language of the statute, its legislative history, or the independent research of the plaintiffs and the Court for applying the same technical standard of voluntariness to private arbitration before an independent and disinterested arbitrator, as is applied to arbitration within the contract market. There were specific examples before Congress of abuses practiced by the contract market, but no suggestion that such abuses extended over into the area of private arbitration by an independent and disinterested arbitrator."

This Court is further buoyed in its conclusion that arbitration is proper here when reference is made to Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F.Supp. 764 (S.D.N.Y. 1972); Berman v. Orimex Trading Co., 291 F.Supp. 701 (S.D.N.Y. 1968) and Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 253 F.Supp. 359 (S.D.N.Y. 1966). These cases discuss the requisitesrequired to bring a commodities transaction within the ambit of the Securities Exchange Act of 1934, and possible reliance on Wilko-type rationale. To qualify as a claim under §10(b), 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5, the commodities transaction in question must fall within the definition of a "purchase or sale of a security", as defined in Section 3 of the Act, 15 U.S.C. §78c(a). Section 3 defines security as, inter alia, an "investment contract". Citing Maheu v. Reynolds & Co.,

282 F.Supp. 423 (S.D.N.Y. 1968) and Berman v. Orimex Trading Co., supra, as authority, Judge Motley in Johnson v. Arthur Espey, Shearson, Hammill & Co., supra, stated:

> "Courts in this Circuit have held that where the broker-dealer has control of investment decisions made for a commodities account and has represented that the profits will result from his efforts alone, then this 'discretionary account' is in effect an investment contract." (citations omitted).

The investment program at bar clearly does not qualify as a "discretionary account" such as to fall within the ambit of the Securities Act of 1934 and to qualify for Wilko v. Swan treatment based on the rationale of Reader v. Hirsch & Co., supra. Plaintiff clearly describes the instant account as "non-discretionary" in nature (see ¶10 of the complaint), and the allegations set forth in ¶9 of the complaint establish that defendants could not vary the terms of the investment program without the express consent of plaintiff.

Based on the foregoing, I conclude that defendants are entitled to arbitrate the instant dispute pursuant to the terms of the Customer Agreement signed by plaintiff. Accordingly, I grant defendants' application to stay the instant proceedings pursuant to 9 U.S.C. §3.[8]

As a consequence of this decision, this case is hereby transferred to the Suspense Docket of this Court, pursuant to local Calendar Rule 20(A). It may be restored to the calendar of the undersigned by any party, on five days notice to the other parties, at any time after the completion of the arbitration proceedings hereinabove referred to.

So Ordered

Dated: New York, New York
March 18, 1977

CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. See ¶15 of plaintiff's complaint.

2. Id ¶17.

3. Id ¶21, 22.

4. See Reg. §180.5 where provision is made for arbitration for disputes beyond $15,000. (See text in footnote 7).

5. 17 C.F.R. §180.3 states as follows:

> "§180.3 Voluntary procedure and compulsory payments.
>
> "(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this Part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.
>
> "(b) No futures commission merchant, floor broker or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:
>
> "(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the futures commission merchant, floor broker or associated person;
>
> "(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;
>
> "(3) The agreement may not require the customer to waive the right to seek reparations under Section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he

or she may seek reparations under Section 14 of the Act by an election made within 45 days after the futures commission merchant, floor broker or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the futures commission merchant, floor broker or associated person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (i.e. do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

"(4) The customer agreement must contain the following cautionary language printed in large boldface type:

"WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

"BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COMMODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 'REPARATIONS' PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.

"(5) If the agreement specifies a forum for settlement other than a procedure established pursuant to section 5a(11) of the Act or this Part, the procedures of such forum must comply with the requirements of §180.5.

"(c) The procedure established by a contract market pursuant to section 5a(11) of the Act or this Part may require parties utilizing such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the procedure was made in accordance with paragraph (b) of this section or that the agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

"(d) The procedure established by a contract market pursuant to the Act or this Part shall not establish any unreasonably short limitation period foreclosing submission of customers' claim or grievances or counterclaims (permitted by §180.4 or this Part) by contract market members or employees thereof."

6. Footnote 18 clarifies the reasoning behind the Commission's position:

"The Commission wishes to note that it carefully considered the alternative to invalidating predispute arbitration agreements suggested by these commentators—to limit proposed §180.3(b) to agreements entered after the effective date of the proposed rule. However, the Commission believes that customers who have already signed arbitration agreements may need the protection afforded by proposed §180.3(b) as much as customers who may enter arbitration agreements in the future, and is not persuaded that the convenience of futures commission merchants and other registrants is a sufficient reason to discriminate between customers on the basis of when they signed arbitration agreements."

7. In discussing the issue of waiver as governed by §14, the Court in Wilko v. Swan notes on p. 435-437:

"Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on

> the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact',...cannot be examined. Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,' that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law. As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended §14...to apply to waiver of judicial trial and review."

The rationale behind the Court's comments should be contrasted with 17 C.F.R. §180.5 which states:

> "A contract market may establish a procedure for settlement of customers' claims and grievances or disputes against any member or employee thereof, which are not covered by §§180.1 through 180.4 of this Part. The procedure shall be independent of, and shall not interfere with or delay the resolution of, customers' claims or grievances submitted for resolution under the contract market procedure established pursuant to the Act. The procedure must be shown to be voluntary, and must be fair and equitable as defined by §180.2 and §180.3 of this Part except that the aggregate monetary value of the claim or grievance or counterclaim, if any, may exceed $15,000."

Clearly the Commission, in enacting §180.5, tacitly approved the use of arbitration machinery to settle disputes arising under the Act—apparently the Commission was not troubled with some of the shortcomings of arbitration pointed out by the Court in Wilko v. Swan.

8. This Court is mindful of Judge Weigel's decision in Milani v. Conti Commodity Services, Inc., (cited in the text of this opinion) where the rationale of Wilko v. Swan was extended to suits alleging violations of the Commodity Exchange Act. Although Judge Weigel gave careful consideration to the rights of investors in general, I decline to follow his reasoning. Instead, I am convinced that Judge Weinfeld's decision in Johnson v. Merrill, Lynch, Pierce, Fenner & Smith, (76 Civ. 2588, S.D.N.Y. 1976), aptly describes those factors to be considered in an arbitration situation concerned with a violation of the Commodity Exchange Act:

> "The motion to stay proceedings in this case pending arbitration is granted. Plaintiff cannot avoid compliance with the arbitration clause to which he consented by claiming the protection afforded by the 'non-waiver of rights' provision of the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a). Plaintiff's claims, based on his purchases and sales of commodity futures contracts, do not arise 'in connection with the purchase or sale of any security," 15 U.S.C. §78j(b); see Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F.Supp. 764 (S.D.N.Y. 1972); Berman v. Orimex Trading Co., 291 F.Supp. 701, 702 (S.D.N.Y. 1968); Maheu v. Reynolds & Co., 282 F.Supp. 423, 426 (S.D.N.Y. 1968); Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 253 F.Supp. 359, 366 (S.D.N.Y. 1966), and thus neither the Exchange Act nor the case of Wilko v. Swan, 346 U.S. 427 (1953), is applicable to those claims. Moreover, the instant case is readily distinguishable from Newman v. Shearson, Hammill & Co., 383 F.Supp. 265 (W.D.Tex. 1974), for in that case the plaintiff did not specifically agree to arbitration, but rather agreed to be bound by the rules of the New York Stock Exchange, which do not compel non-members to arbitrate disputes."

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
For the Second Circuit

Harold Ames

Plaintiff-Appellant

against

Merrill, Lynch, Pierce, Fenner & Smith Inc., and Christopher V. Streit

Defendants-Appellees

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Lowenthal Landau Fischer & Singer being duly sworn, deposes and says that he is over the age of 21 years and resides at 11 Park Place New York, New York

That on the 17th day of June 1977 at 165 Broadway New York, New York he served the annexed Brief and Appendix upon James J. Dolan Esq.

in this action, by delivering to and leaving with said attorney 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 17th. day of June 1977

Raymond J. Braddick

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1978